The defendant having failed to discharge the onus cast on him and I having held that he was a licensee, there will be an order for his ejectment and an order that he pay to the plaintiff damages at the rate of $20 per month from 1 May 1969 as also the costs of this suit.

Regarding Civil Suit No. 216 of 1969 which is a suit in which the plaintiff alleges that he had been wrongfully dismissed from his employment and in which he seeks to recover the gratuity and provident fund to which he was entitled while in the service of the defendant, I have already held that he was retired from service on attaining the age of fifty five. No question of any unlawful dismissal consequently arises. No evidence in fact was led in that case by the plaintiff and it was agreed that the evidence produced in the earlier suit should be treated as evidence in this case. The defendant has always been ready and prepared to pay the gratuity and provident fund to the plaintiff provided that he vacated the quarters. No evidence was led to prove that the plaintiff in this suit had sustained any damage. His claim for damages in this suit is dismissed. The defendant will pay him whatever is due to him on account of gratuity and provident fund after deduction of the damages and costs which he as the plaintiff in the earlier suit is entitled to recover. There will be no order as to costs in this suit.

Order accordingly.

Solicitors: *Suleiman C. Navarednam & Co.; Gurdian Bakan Singh.*

ONG ENG CHAI v. CHINA INSURANCE CO. LTD.

[O.C.J. (Hashim Yeop A. Sani J.) December 14, 1973]
[Kuala Lumpur — Civil Suit No. 331 of 1970]

Insurance — Misrepresentation and concealment of facts — Contract uberrimae fidei — Proposal form signed by agent of defendant company — Whether agent of proposer — — Whether insurance company can disclaim liability.

The plaintiff claimed under a policy of insurance in respect of his car. The defendants pleaded that the policy was void as the proposal form contained untrue statements and answers. The proposal form had been filled in and signed by an agent of the defendant's company and it contained untrue answers to the question whether any previous insurance had been declined, refused or cancelled.

Held: (1) the untrue answers to the questions entitled the defendant company to avoid the contract;

(2) in the circumstances the agent of the company, when he signed the proposal form, did so as the agent of the plaintiff and therefore the plaintiff was bound.

Cases referred to:-

(1) *Goh Chooi Leong* v. *Public Life Assurance Co. Ltd.* [1964] M.L.J. 5.

(2) *Rozanes* v. *Bowen* (1928) 32 Ll. L.R. 98, 102.

(3) *Dawsons Ltd.* v. *Bounin and others* [1922] All E.R. Rep. 88.

(4) *Newsholme Brothers* v. *Road Transport and General Insurance Co. Ltd.* [1929] All E.R. Rep. 442.

(5) *Biggar* v. *Rock Life Assurance Co.* [1902] 1 K.B. 516.

CIVIL SUIT.

Balwant Singh Toor for the plaintiff.

Khoo Eng Chia for the defendant.

Hashim Yeop A. Sani J.: This is a suit in which the plaintiff claims from the defendant insurance company for cost of repairs, loss of use, demurrage and depreciation in respect of motor-car Registration No. MC 867 purporting to be covered by a comprehensive policy issued by the defendant insurance company. The defendants in their defence and counter-claim deny that they are liable and seek to avoid the policy on the grounds that the proposal made by the plaintiff and/or his agent contains certain untrue statements and answers, misrepresentations, concealment and suppression of truth.

The facts contained in the statement of agreed facts are as follows: —

"That by a Proposal and Declaration dated 6th November, 1968, the plaintiff requested the Defendants to issue to him a Policy of Insurance to cover, *inter alia*, loss of or damage to the plaintiff's said motor car No. MC 867.

That in pursuance of the said Proposal and Declaration and in consideration of the payment of the premium in the sum of $359.40 the Defendant issued to the Plaintiff a Policy of Insurance No. MC 368231 on the 25th November, 1968

That on the 9th December, 1968 between 7.30 p.m. and 9.50 p.m., the plaintiff parked his said motor car No. MC 867 in front of the State Cinema, Petaling Jaya and the said motor car was subsequently found to be stolen. A report of the theft was made at the Petaling Jaya Police Station, vide Report No. 7131/68.

That the said motor car was subsequently recovered by the Police and several accessories were missing.

That the Plaintiff's said motor car was previously insured with the National Insurance Co. Ltd., of Kuala Lumpur.

That the Plaintiff submitted his claim for the loss of accessories to the Defendants but the Defendants denied the claim on the ground that the said Policy of Insurance No. MC 368231 had been obtained by non-disclosure of material facts."

From the evidence adduced during the trial, the following additional facts came to light: —

(1) The proposal form (enclosure 7 in the Agreed Bundle) was not signed by the plaintiff but by one Lim Keat Chye who was and still is an agent of the defendant company.

(2) A negative answer was given to each of the questions specified in the proposal form which read as follows: —

"Has any Company or Underwriter in respect of the insurance on any motor vehicle
(a) Declined to insure you?
(b) Refused to renew Insurance?
(c) Cancelled your policy?"

(3) On the 27th of September, 1968, that is, less than two months before the said proposal form was filled up, the plaintiff had been given notice of the cancellation of the comprehensive insurance policy in respect of the said car No. MC 867 by the National Insurance Co. Ltd. (enclosure 16 in the Agreed Bundle); the reason for this cancellation was that the company had discovered that the previous insurance company of the plaintiff had treated his vehicle as a Total Loss (evidence of DW3 and enclosure 16 in the Agreed Bundle).

Such being the evidence, there is very little left to be considered in this case. The issues left to be considered can, in my opinion, be summarised as follows: —

(1) Whether the untrue answers to the questions referred to entitle the defendant company to avoid the contract; and

(2) Whether Lim Keat Chye, when he signed the proposal form, did so as an agent of the defendant company or an agent of the plaintiff.

As regards the first issue, like the usual proposal forms issued by insurance companies, there is at the bottom of the instant proposal form (enclosure 7 in the agreed bundle) a declaration in these terms: —

"I/We declare the above statements and particulars to be true and correct, and agree that they shall be the basis of the contract between the Company and myself (ourselves)."

It would seem to me that judging from the statement of counsel for the plaintiff, the materiality question was not an issue raised in this case. However, I would like to settle this issue first before coming to the second issue. It is settled law that where in a proposal to effect an insurance the parties agree that something should be the basis of the contract, it would not be open to the court to consider the question of materiality. There is no doubt here that the proposal form is the basis of the contract between the plaintiff and the defendant company as it is so declared in the declaration printed at the bottom of the proposal form. What is left to be considered to settle this first issue is whether the answers to those questions referred to are untrue. From the evidence adduced during the trial, it has been established as a fact that his previous insurance policy was cancelled. In fact, according to DW3 (an officer of the National Insurance Co.), when the plaintiff proposed to his company the plaintiff did not disclose that he had previously been issued with another insurance policy by yet another insurance company and which company had treated the vehicle as a Total Loss (enclosures 16 and 17 in the agreed bundle). Gill J. (as he then was) in *Goh Chooi Leong* v. *Public Life Assurance Co. Ltd.*[1] described as "trite law" that a contract of insurance is a contract *uberrimae fidei* which can be avoided for non-disclosure of material facts. The classical authority is of course the judgment of Scrutton L.J. in *Rozanes* v. *Bowen*: —[2]

"As the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have a policy, to make a full disclosure to the underwriters without being asked of all the material circumstances, because the underwriters know nothing and the assured knows everything. This is expressed by saying that it is a contract of the utmost good faith — *uberrima fides*."

In the instant case, according to the evidence of DW1, an officer in the defendant insurance company, if the answers to the questions referred to earlier were in the affirmative his company would investigate further into the matter and if confirmed that the vehicle in question had already been subject to an accident and regarded as a Total Loss, his company might be willing to insure, but only on third party basis. In *Dawsons, Ltd.* v. *Bonnin & Ors.*,[3] Viscount Haldane said on page 94:

"... Both on principle and in the light of authorities such as those which I have already cited, it appears to me that, when answers, including that in question, are declared to be the basis of the contract, this can only mean that their truth is made a condition exact fulfilment of which is rendered by stipulation foundational to its enforceability."

In *Dawsons'* case, the claim was for the loss of the insured lorry by fire. There was a misstatement in the proposal form relating to the address of the garage for the lorry. As in this case there was also a declaration in the proposal form that the truthfulness of all the answers was to be the basis of the contract. If this issue be the only issue in this case, judgment of this case must surely be entered in favour of the defendant company. However, I still have to consider the second issue referred to above, that is, whether Lim Keat Chye signed the proposal form as an agent of the parent company or an agent of the plaintiff. To settle this issue we must go back to the evidence adduced. It has clearly been established from the evidence of the plaintiff, PW2 (his brother-in-law), PW3 (a clerk employed by the Lim Keat Chye Agency) and the evidence of Lim Keat Chye that it had been the practice for many years for the plaintiff whenever he wanted an insurance company to cover his vehicles he simply instructed his brother-in-law, PW2, to arrange for the insurance. PW2 on his part would get in touch with PW3 and give the latter all the particulars necessary to fill in the proposal forms. In this particular case, it would appear to me that the questions and answers were communicated entirely by telephone between PW2 and PW3. According to PW3, PW2 had answered all the questions asked by him in accordance with the proposal form and he on his part filled up the answers accordingly. He also added that sometimes with the permission of the person asking for the cover note, Lim Keat Chye also signed the proposal form. But in this case he was not sure whether Lim Keat Chye informed the defendant company about his signing the proposal form.

According to Lim Keat Chye, in this particular case he asked PW3 why the proposal form was not signed but PW3 replied that his (Lim Keat Chye's) sub-agent — that is, PW2 — had authorised him to sign it. I find this indeed a peculiar system of conducting insurance business. But that is beside the point.

From the evidence of DW1, who is an officer of the defendant insurance company, Lim Keat Chye was not authorised to fill in proposal forms to the company. Neither was Lim Keat Chye authorised by the company to sign on behalf of the proposer. Proposal forms like this normally went to his personal attention but when he received the proposal form in question, he was not aware that the signature was that of Lim Keat Chye. He was not familiar with the signature of Lim Keat Chye then until now when he had seen it. I believe him because on looking at the signature, which is quite intelligible, I find that by looking at it alone would not arouse one's suspicion that it was not the signature of the proposer; in any case the proposer in the proposal form in question carries two names.

Let us now come to the question: Whose agent was Lim Keat Chye when he signed the proposal form in question. It was the plaintiff's counsel's contention that he was the agent of the defendant company but unfortunately the counsel forwarded no arguments. The proposal form was filled in by PW3, as requested by PW2 on the instructions of the plaintiff; PW3, who was at the material time a clerk in the Lim Keat Chye Agency, filled in the forms in the course of his employment as such. In *Halsbury's* Laws of England, Third Edition, Volume 22 at page 204 it is stated that:

"In filling in the answers in a proposal form an insurance agent, except in the case of industrial assurance, is normally regarded as the agent for the proposer, at the request, express or implied, of the latter."

In *Newsholme Bros.* v. *Road Transport and General Insurance Co. Ltd.*,[4] in answer to three of the questions set out in the proposal form, the agent wrote those answers on the form incorrectly either because he had misunderstood or forgotten what was told to him or intentionally to earn a commission which otherwise he might not receive. It was held by the Court of Appeal that the agent was not authorised by the company to fill in the proposal form and in doing so must be regarded as the agent of the proposer. In *Biggar* v. *Rock Life Assurance Company*,[5] a policy of insurance against accidental injury was effected with an insurance company through their local agent. The proposal form was filled up by the agent, many of the answers filled in by him being false in material respects; the false answers were inserted without the knowledge or authority of the applicant, who signed the proposal form without reading it. The proposal contained also a declaration that the statements in the proposal should form the basis of the policy. It was held, *inter alia*, that in filling in the false particulars the agent was acting, not as the agent of the insurance company, but as the agent of the applicant.

There is ample evidence that the plaintiff in this case had left the question of effecting the insurance on his behalf entirely to other persons and in fact he expressly instructed his brother-in-law, PW2, who is a sub-agent of the Lim Keat Chye Agency, to effect the insurance on his behalf. In *MacGillivray's* Insurance Law, Fifth Edition, at page 976, paragraph 978 deals with such situation as follows: —

"If the assured employs an agent to effect an insurance for him the fraud or misrepresentation of the agent in or about effecting the insurance will invalidate the policy, notwithstanding that the false statements have been made without the assured's authority, or even contrary to his express instructions. The assured is also responsible for the non-disclosure by such agent of anything within the agent's knowledge, however obtained, which is material to the risk. It is no answer for the assured to say that he had instructed his agent to disclose the facts or that he (the assured) had no knowledge of the facts known to his agent."

From the evidence in this case, it is clear that the plaintiff had authorised PW2 to do such things as he thought fit to effect the insurance on his behalf. He had left the whole thing to PW2. PW2 had in turn communicated to the same effect to PW3, and PW3 to DW2. A legal relationship of principal and agent was thus created in respect of the proposal to effect the insurance in question between the plaintiff and PW2, and Lim Keat Chye (DW2) had authority by implication to sign the proposal form on behalf of the plaintiff. *Qui facit per alium facit per se.*

I have no alternative therefore but to dismiss the action with costs and make an order accordingly.

Action dismissed.

Solicitors: *Singh Bros.; Khoo & Sidhu.*

PUBLIC PROSECUTOR v. UNG AH LENG

[A.Cr.J. (Chang Min Tat J.) December 14, 1973]
[Penang — Criminal Appeal No. 66 of 1973]

Road Traffic Ordinance, 1958, ss. 74 and 79 — Riding a motor-cycle without a licence — Insurance policy held in respect of motor-cycle — Charge of riding motor-cycle without a policy of insurance in respect of third party risks — Sentence.

In this case the Public Prosecutor appealed against the sentence imposed on the respondent on a charge of riding a motor-cycle without a policy of insurance in respect of third party risks to which he had pleaded guilty. The respondent had been fined $20 and the appeal was on the ground of manifest inadequacy.

Held: (1) as the respondent did not hold a licence to drive the motor-cycle, he did not have a valid policy of insurance against third party risks as required by section 74 of the Road Traffic Ordinance;

(2) in the circumstances the fine would be increased to $50.

Cases referred to:-

(1) *Public Prosecutor* v. *Nasir* [1972] 2 M.L.J. 38.

(2) *Velusamy & Anor* v. *Public Prosecutor* [1974] 1 M.L.J. 15.

CRIMINAL APPEAL.

T. Selvanthiranathan (Deputy Public Prosecutor) for the appellant.

Respondent in person.

Chang Min Tat J.: This was an appeal by the Deputy Public Prosecutor from the fine of $20 imposed by the learned magistrate in Penang on a charge of riding a motor-cycle without a policy of insurance in respect of third party risks, under section 74(1) and section 74(2) of the Road Traffic Ordinance No. 59 of 1958, to which the respondent had pleaded guilty. The appeal was on the ground of manifest inadequacy.

At the hearing of the appeal, my attention was drawn to the following facts: —

(1) The respondent held a provisional licence for motor-cycles valid until 2 April;

(2) he had passed the proficiency test on 10 February and his success was endorsed on the reverse of his provisional licence;

(3) he was therefore at any time thereafter entitled on application to a fully proficient licence;

(4) he however failed to take out such a licence;

(5) he also held a proficient car-driving licence valid until November 1973;

(6) the offence was committed on 20 April;

(7) he held an insurance policy in his own name in respect of the motor-cycle, the subject matter of the offence for the period 1 February 1973 to 31 January 1974, and

(8) at no time was this insurance policy cancelled by the insurers.

The respondent endeavoured to explain that he was advised by someone in the office of the R.I.M.V. Penang that his car driving licence carried with it an authority to ride his motor-cycle. He did not call this someone. In any event, the advice if given was clearly wrong. All licences state the types of vehicles permitted to be driven. Further, in respect of third party insurance, a motor-car insurance policy ordinarily excludes the riding of motor-cycles.